

No. 15,320

In the

United States Court of Appeals

For the Ninth Circuit

EDWARD A. FERGUSON and AMANDA FER-
GUSON, Husband and Wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellants' Opening Brief

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JURISDICTION

Appellants brought this action to recover damages for personal injuries caused by the negligence of a member of the United States Air Force while acting within the scope of his office or employment. The jurisdiction of the District Court was invoked under the Federal Tort Claims Act, Aug. 1, 1947, ch. 446, 61 Stat. 722; 28 U.S.C.A. § 1346 (b). The complaint alleged that the jurisdiction of the District Court arose under the Federal Tort Claims Act, and that on or about June 24, 1955, Francis Maka, a member of the United States Air Force, while acting within the scope of his office or employment, carelessly, recklessly and negligently drove a Government truck, causing it to collide with an automobile

in which Appellant Amanda Ferguson was a passenger. (R. 3-4) The answer admitted all of these allegations with the exception that it denied the Government truck was driven carelessly, recklessly and negligently. (R. 6)

The Findings of Fact of the District Court confirmed the jurisdictional allegations. (R. 28-29) The final judgment of the District Court was entered on July 9, 1956. (R. 18-19) On July 12, 1956, Appellants filed a motion to alter or amend the judgment or in the alternative for a new trial. (R. 19-27) The motion was denied on August 13, 1956. (R. 31) Appellants' Notice of Appeal was filed on August 21, 1956. (R. 31-32) The jurisdiction of this Court is invoked under Act June 25, 1948, ch. 646, 62 Stat. 929; 28 U.S.C.A. § 1291.

STATEMENT OF THE CASE

On June 24, 1955 Appellant Amanda Ferguson accompanied her daughter, Mrs. Estelle Hopkins, to a residence on the corner of Topeka Street and South Fifth Avenue in Kingman, Arizona. (R. 37, 61) Mrs. Hopkins parked her car on the shoulder of Topeka Street, entirely off the pavement. (R. 11, 14, 28-29) When they finished their business, they came out and entered Mrs. Hopkins' car. (R. 37)

Just after the two ladies got into the car an Air Force truck, driven by a United States airman, ran off Topeka Street, collided with a car parked ahead and then crashed into Mrs. Hopkins' car with severe force. (R. 3-4, 6, 11-14, 28-29, 37, 61; Exhibits 4, 5 and 6)

The United States of America (hereinafter called "Government") admits liability for the collision and the injuries and damages caused thereby. (R. 29, 35)

As a result of the collision Mrs. Ferguson received cuts over the right eye and on the arms, bruises on both knees and the right leg, a contusion of the right hip, an injury to the left shoulder girdle and moderate cerebral concussion. (R. 37-38; Exhibit 2) She was taken by ambulance to Mohave General Hospital where she was attended by Dr. A. A. Arnold of Kingman. (R. 38)

Dr. Arnold placed stitches in the cut over Mrs. Ferguson's eye and committed her to bed. She remained in the hospital two days and was then permitted to go home. (R. 38; Exhibit 2) She remained at home for a week, then went back to her job as cook for the Casa Linda Cafe in Kingman. (R. 38, 41, 48)

Before the collision Mrs. Ferguson had been in general good health. In April of 1951 she consulted Dr. Walter Brazie of Kingman, her family physician, for treatment for flu. Dr. Brazie happened to take her blood pressure at that time and found that it was a little high. He gave her three treatments to reduce the blood pressure and continued to see Mrs. Ferguson on an average of once a year. (R. 40, 54-55, 67-69, 78, 85) Even though she had high blood pressure, Mrs. Ferguson was never troubled by it and her condition was in no way disabling. (R. 51, 54-55, 68, 89) She had very little trouble with headaches and she was never troubled with loss of memory, dizziness, disturbed vision, general weakness or extreme nervousness. (R. 40-41, 45-46, 62-63)

Mrs. Ferguson had been working as a cook at the Casa Linda Cafe for almost five years at the time of the collision. (R. 39-40, 56-57) The first two years she was the fry cook, then she became the dinner cook. (R. 57) As dinner cook her duties required that she work three hours on the grill, do

the baking, prepare the menu, prepare the dinner and keep the supplies up. (R. 39, 57) The cafe has a capacity of 62 persons. (R. 57) Mrs. Ferguson was on a six-day week and her work was very satisfactory. (R. 57, 58) During the almost five years of her employment she had missed work because of illness on only two occasions—she was off work four days in 1954 because of a cold and a few days in 1955 because of the flu. (R. 39, 40, 58, 76)

In addition to her work at the cafe Mrs. Ferguson performed most of the housework in her home. (R. 55)

When Mrs. Ferguson returned to her job following the collision she tried for four weeks to perform her work. (R. 48, 53) During that time she suffered constant headaches, impaired memory and weakness. She was slow in her work and could not perform it without assistance. (R. 41, 58-59) Then, on July 30, 1955, she was stricken with an attack of nausea, visual disturbance, dizziness, intractable headaches and mental confusion—almost a state of collapse. (R. 42, 63, 93; Exhibit 1)

Dr. Arnold immediately placed Mrs. Ferguson in the hospital where she remained for four days. (R. 42) Dr. Arnold believed she was suffering from a post concussion syndrome (Exhibit 1) and suggested that she see Dr. John Eisenbeiss, a neuro-surgeon in Phoenix, Arizona. (R. 42, 51) Dr. Eisenbeiss examined Mrs. Ferguson and referred her to Dr. John Westfall, a specialist in internal medicine. (R. 42-43, 51, 90, 91) Dr. Westfall examined Mrs. Ferguson on August 23, 1955 and started her on a mild drug. (R. 92, 94)

When she returned to Kingman, Mrs. Ferguson saw Dr. Arnold once and then submitted herself again to the care of Dr. Brazie. Dr. Brazie saw her on September 26, 1955 and has continued to see her every two weeks since. (R. 43, 53, 69, 70)

Even now Mrs. Ferguson continues to suffer from disturbed memory, weakness, dizziness and extreme nervousness. (R. 38, 44-46, 62-63, 71-72, 87) Objectively, her reactions are not as quick as they were before; she is more sluggish and slow moving. (R. 77)

Except for the brief, four-week period soon after the collision, Mrs. Ferguson has never been able to return to her employment. (R. 41, 45) She now can perform only her light housework and her husband must do the rest. (R. 52-53, 55-56) She is only 55 years of age. (R. 41, 56)

At the time of the collision Mrs. Ferguson was earning \$66.00 per week. (R. 40, 49, 58) She was the sole means of support for herself and her husband. (R. 40) She is not trained or educated to perform any kind of work, other than cook, for the purpose of earning a living. (R. 40)

Mrs. Ferguson has sustained damage to her nervous tissue. (R. 83-84) She has a permanent scar over the right eyebrow. (R. 29, 37-38)

The collision and resulting injuries to Mrs. Ferguson aggravated her previously dormant heart condition and brought about the symptoms from which she now suffers. (R. 29, 71-72, 88, 96) Those symptoms are disabling. (R. 29, 72)

Dr. Brazie, the family physician, and Dr. Westfall, the specialist, in their qualified medical opinions, state that Mrs. Ferguson's disabling symptoms are now stationary and that Mrs. Ferguson will never again be able to return to a gainful occupation. (R. 72, 80-81, 83, 96, 101, 105) Dr. Dennis Born, a general practitioner who examined Mrs. Ferguson on one occasion at the request of the Government, testified that if Mrs. Ferguson's blood pressure could be controlled to where she was free of all symptoms, she could

then return to work, and in most cases the blood pressure can be controlled. (R. 118, 124)

The main question presented is whether Mrs. Ferguson's disabling condition is permanent. The Government, in the answer, denies that it is. (R. 5, 6) Another question is whether \$1,000.00 is a fair and reasonable sum for pain and suffering. The third question is whether Mrs. Ferguson was earning \$60.00 per week or \$66.00 per week. The latter two questions were raised by Appellants' Motion to Alter or Amend Judgment or in the Alternative for a New Trial (R. 19) and Motion to Amend Findings of Fact. (R. 30)

SPECIFICATIONS OF ERROR

The District Court erred:

1. In making the following portion of Finding of Fact No. 4 (R. 29):

“ * * * Amanda Ferguson's pre-existing hypertensive heart condition was aggravated to the extent that it caused temporary total disability.”

for the reason that the evidence was uncontradicted that Mrs. Ferguson's disability is permanent, and there is no sufficient evidence to support a finding that it is only temporary.

2. In making Finding of Fact No. 5(a) (R. 29), that Appellants have been damaged by reason of loss of earnings in the sum of \$3,000.00, for the reason that said finding is based on the erroneous assumption that Mrs. Ferguson was earning only \$60.00 per week, when the evidence is uncontradicted that she was earning \$66.00 per week.

3. In making Finding of Fact No. 5(b) (R. 29), that Appellants have been damaged by reason of loss of future

earnings in the sum of \$6,000.00, for the reason that said finding assumes that Mrs. Ferguson is only temporarily totally disabled, when the evidence is uncontradicted that her disability is permanent, and said finding also assumes that Mrs. Ferguson will be totally disabled for approximately two years in the future, when there is no sufficient evidence to support said finding.

4. In making Finding of Fact No. 5(c) (R. 29) that Appellants were damaged by reason of pain and suffering in the sum of \$1,000.00, for the reason that said sum is grossly inadequate under the evidence as to the condition suffered by Mrs. Ferguson since the collision, the condition now suffered by her, the condition she will suffer in the future and the permanent, disfiguring scar.

SUMMARY OF ARGUMENT

The evidence was uncontradicted that Mrs. Ferguson is permanently disabled. There was no sufficient evidence to support the findings made by the trial court that Mrs. Ferguson is only temporarily disabled, and that her disability will continue for approximately two years. Hence, said findings are clearly erroneous. Rule 52, Federal Rules of Civil Procedure, 28 U.S.C.A.

The evidence was uncontradicted that Mrs. Ferguson was deprived of \$3,300.00 in earnings to the time of trial. The finding that she lost only \$3,000.00 is therefore clearly erroneous.

Where the uncontradicted evidence shows that Mrs. Ferguson received multiple injuries as a result of the collision, that she has a permanent, conspicuous scar on her forehead as a result of said injuries, that for more than a year she has suffered from headaches, impaired memory, weakness,

extreme nervousness and other symptoms, all as a result of the collision, and that the symptoms are permanent, the sum of \$1,000.00 for paid and suffering, both past and future, is grossly inadequate.

ARGUMENT

I. The Evidence Was Uncontradicted That Mrs. Ferguson's Disability Is Permanent.

The trial court found, in accordance with the uncontradicted evidence, that the collision of June 24, 1955 aggravated Mrs. Ferguson's previously dormant hypertensive heart condition and brought about her present, disabling symptoms. Clearly, therefore, Appellants are entitled to be compensated for her disability. *Hartford Acc. & Indem. Co. v. Industrial Commission*, 38 Ariz. 307, 299 Pac. 1026, 1028; *United States v. Fotopulos*, 9 Cir., 180 F.2d 631, 640; 15 *Am. Jur., Damages*, Sec. 81, p. 490. As the Arizona Supreme Court so aptly said, "The law extends its protection to the afflicted as well as the healthy and strong." *Kalaf v. Assyd*, 60 Ariz. 33, 130 P.2d 1036, 1037.

Dr. Brazie has attended Mrs. Ferguson and has seen her every two weeks since September 26, 1955, a period of over nine months to the time of trial. During that time Dr. Brazie has treated Mrs. Ferguson with all the ordinary drugs for hypertension, he has shifted from one to the other, he has used combinations and he has given her intensive treatment with the newer drugs—all in an effort to control her blood pressure—without success. (R. 71, 73, 81) In Dr. Brazie's opinion, which is obviously well-qualified, Mrs. Ferguson's disability, which was brought on by the collision, is permanent.

Dr. John Westfall, a specialist in internal medicine, is likewise of the opinion that Mrs. Ferguson's disability is permanent.

Despite the testimony of these two, well-qualified physicians, the trial court found that Mrs. Ferguson's disability was only temporary. Furthermore, by awarding \$6,000.00 for loss of future earnings, the trial court found that Mrs. Ferguson's disability would continue for a little less than two years (at \$60.00 per week). These findings are without support in the evidence and are therefore clearly erroneous. Rule 52, Federal Rules of Civil Procedure, 28 U.S.C.A.

The erroneous findings could have been based only on the testimony of Dr. Dennis Born, who is not a specialist and who observed Mrs. Ferguson on only one occasion for between 30 and 40 minutes. (R. 115) Yet even Dr. Born did not testify that in his opinion Mrs. Ferguson's disability was only temporary. All Dr. Born said was that if Mrs. Ferguson's blood pressure could be controlled to where she was free of symptoms, then she could return to work. (R. 118, 120, 124) But when he was asked if in his opinion Mrs. Ferguson's blood pressure could be controlled, Dr. Born said, "There are cases which are difficult to control and some which are uncontrollable. However, most cases are controllable." (R. 118, 120) Dr. Born quite truthfully admitted that he was not familiar with Mrs. Ferguson's condition prior to the accident or her condition since the accident, and he did not follow her blood pressure readings for an extended period of time, so he was not in a position to say whether or not Mrs. Ferguson's blood pressure will ever be controlled. (R. 122)

In substance, therefore, Dr. Born merely testified that he didn't know whether or not Mrs. Ferguson's blood pressure could be controlled; most cases are controllable, and if Mrs. Ferguson's is ever controlled, then she can return to work. We respectfully urge that under no sensible view of the evidence does this testimony contradict the testimony of

Dr. Brazie (who for more than nine months has done everything to control Mrs. Ferguson's blood pressure) and Dr. Westfall (who is a specialist in these matters) that her blood pressure cannot be controlled and her disability is permanent.

By indulging Dr. Born's testimony with the greatest conceivable weight, one might infer that in his opinion it is possible that Mrs. Ferguson's blood pressure might be controlled. Even if this inference were indulged, however, it falls far short of the required evidence. Expert testimony regarding future consequences of an injury or the permanency thereof must be in terms of the certain or probable, and not merely the possible. 20 *Am. Jur., Evidence*, Sec. 863, p. 725; *Hartford Acc. & Indem. Co. v. Industrial Commission*, supra, 299 Pac. 1026, 1028.

Though \$6,000.00 was awarded for loss of future earnings, there is not the slightest evidence to justify a finding as to what period of time in the future, if not permanently, Mrs. Ferguson will continue to be disabled. Appellants can only conclude that the trial court substituted its own opinions for those of the physicians. In *Guarantee Ins. Co. v. Industrial Acc. Commission*, 88 Cal. App. 2d 410, 199 P.2d 12, 14, the proper rule is stated as follows:

"We are satisfied this case falls within the established rule that when the diagnosis of a physical condition depends essentially upon the knowledge, skill and experience of medical expert witnesses, and is not within the common knowledge of non-expert laymen, the evidence of such medical experts is conclusive upon that issue. * * *"

The evidence of the medical experts in this case conclusively established that Mrs. Ferguson is permanently disabled.

II. Mrs. Ferguson Lost \$3,300.00 in Earnings to the Time of Trial.

It was uncontradicted that in her employment Mrs. Ferguson worked a six-day week for which she received \$60.00 plus a \$6.00 board allowance—a total of \$66.00 per week. (R. 40, 49, 58) She worked four weeks of the fifty-four that had elapsed to the time of trial. (R. 48, 53)

Consequently, as a result of the collision Mrs. Ferguson was deprived of \$3,300.00 in earnings to the time of trial. The finding made by the trial court that she lost only \$3,000.00 is based on the assumption that Mrs. Ferguson earned only \$60.00 per week and is, therefore, clearly erroneous.

III. The Award of \$1,000.00 for Pain and Suffering Is Grossly Inadequate.

Aside from the aggravation of her previously dormant heart condition, Mrs. Ferguson sustained cuts over the right eyebrow and on the arms, bruises on both knees and the right leg, a contusion of the right hip, an injury to the left shoulder girdle and moderate cerebral concussion. The cut over the right eye has left a scar which is conspicuous and permanent. There has been damage to her nervous tissue.

For several weeks following the collision Mrs. Ferguson suffered constant headaches, impaired memory and weakness. Then she was stricken with an attack of nausea, visual disturbance, dizziness, intractable headaches and mental confusion, for which she was placed in the hospital the second time.

At the present time Mrs. Ferguson continues to suffer from disturbed memory, weakness, dizziness and extreme nervousness. She cannot work, she cannot perform her normal household duties and she cannot enjoy the company of her children and grandchildren as she did before the collision. (R. 45-46, 62-63) Her present condition is permanent.

For pain and suffering, both past and future, the trial court awarded \$1,000.00. It is well-settled that a plaintiff who suffers an inadequate award is as much entitled to relief as a defendant who suffers an excessive one. Secs. 21-1301 and 21-1403 *Arizona Code 1939*; 15 *Am. Jur., Damages*, Sec. 231, p. 663.

Appellants do not seek sympathy money. They are aware that no sum of money will restore Mrs. Ferguson to her former condition. But Appellants do believe they are entitled to a fair and reasonable award, and the sum of \$1,000.00 can hardly be called fair or reasonable. By any standards the award of \$1,000.00 for pain and suffering is grossly inadequate.

CONCLUSION

The questions raised on this appeal require an objective appraisal of the evidence. Clearly there is no sufficient evidence to support findings that Mrs. Ferguson is only temporarily disabled and that her disability will continue for approximately two years. It is also apparent that Mrs. Ferguson was deprived of \$3,300.00 in earnings to the time of trial, and that \$1,000.00 for pain and suffering, both past and future, is grossly inadequate. We submit that upon an objective appraisal of the evidence, this Court should be left with a definite and firm conviction that a mistake has been committed. *United States v. United States Gypsum Co.* 68 S.Ct. 525, 333 U.S. 364, 92 L.Ed. 746; *United States v. Oregon State Medical Society*, 72 S.Ct. 690, 343 U.S. 326, 96 L.Ed. 978.

Appellants urge the Court to reverse the erroneous findings, together with the judgment entered thereon, with

directions to enter judgment in accordance with a determination by this Court that Mrs. Ferguson is permanently disabled, that she lost \$3,300.00 in earnings to the time of trial, and that \$1,000.00 for pain and suffering is grossly inadequate. 28 U.S.C.A. § 2106.

Respectfully submitted,

MOORE & ROMLEY

By JARRIL F. KAPLAN

